



In the Matter of:

**LARRY MARTIN,**

**ARB CASE NO. 02-031**

**COMPLAINANT,**

**ALJ CASE NO. 01-CAA-16**

**v.**

**DATE: July 31, 2003**

**AKZO NOBEL CHEMICALS, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

Larry Martin, Jr., *pro se*, *The Woodlands, Texas*

***For the Respondent:***

Lansford O. Ireson, Jr., *Ireson & Weizel, P.C., Houston, Texas*

### **FINAL DECISION AND ORDER**

This case is before the Administrative Review Board (ARB) pursuant to the employee protection provisions of the Clean Air Act (CAA), 42 U.S.C. § 7622 (2000). The Complainant (Martin) asserts that his employer, AKZO Nobel Chemicals, Inc., (AKZO)<sup>1</sup> violated the employee protection (whistleblower) provisions of the CAA when AKZO allegedly retaliated against him, by suspending Martin without pay for three days, for reporting a CAA violation to the Texas Natural Resource Conservation Commission

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<sup>1</sup> The Complainant is an employee of AKZO Nobel Polymer Chemicals LLC, a wholly owned subsidiary of AKZO Nobel Chemicals, Inc., *see* Respondent's Post-Hearing Brief.

(TNRCC) and causing an inspection of AKZO by the TNRCC.<sup>2</sup> Following a hearing, the Administrative Law Judge (ALJ) found that Martin had failed to meet his evidentiary burden and, therefore, recommended that Martin's complaint be dismissed. Martin appeals. We affirm.

## JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to decide this appeal. *See* 29 C.F.R. § 24.8(a) (2002) and Secretary's Order No. 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002). The ARB is not bound by either the ALJ's findings of fact or conclusions of law but reviews both de novo. *See* 5 U.S.C. § 557(b) (2000); *Jenkins v. United States Env'tl. Prot. Agency*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 9 (ARB Feb. 28, 2003) and authorities there cited.

## THE REQUIREMENTS OF THE ACT

The CAA prohibits discrimination with respect to an employee's compensation, terms, conditions or privileges of employment because the employee or representative has:

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan . . .

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of the Act.

42 U.S.C. § 7622(a)(1), (3).

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<sup>2</sup> Martin appears pro se. His brief to the Board is merely a copy of the same post-hearing brief that was filed with the Administrative Law Judge (ALJ) on his behalf by his counsel who represented him before the ALJ at that time. Nevertheless, we have construed his brief liberally, i.e., we read it as asserting that the ALJ's conclusions of law were erroneous. *See Williams v. Baltimore City Pub. Schools Sys.*, ARB No. 01-021, ALJ No. 00-CAA-15, slip op. at 1 n.2 (ARB May 30, 2003); *Young v. Schlumberger Oil Field Servs.*, ARB No. 00-075, ALJ No. 00-STA-28, slip op. at 8 (ARB Feb. 28, 2003).

## STATEMENT OF ISSUE

Whether Martin has demonstrated that, at the time that AKZO made the disciplinary decision to suspend Martin from work without pay for three days, any AKZO employee who was involved in the decision knew that Martin had reported a CAA violation to the TNRCC.

## DISCUSSION

We have reviewed the record, and we find that it fully supports the ALJ's findings of fact and conclusions of law. We therefore adopt the findings and conclusions set forth in the attached decision. However, we note that in describing the law, the ALJ made certain misstatements that do not affect the disposition of this case.

To establish a prima facie case of unlawful discrimination under the environmental whistleblower statutes, such as the CAA, a complainant needs only to present evidence sufficient to raise an inference, a rebuttable presumption, of discrimination. As the Secretary and the Board have noted, a preponderance of the evidence is not required. *See Williams*, ARB No. 01-021, slip op. at 1 n.7. A complainant meets this burden by showing that the employer is subject to the applicable whistleblower statute, such as the CAA, that the complainant engaged in activity protected under the statute, that the employer was aware that the complainant engaged in activity protected under the statute, that the complainant suffered adverse employment action, and that a nexus existed between the protected activity and adverse action. *See Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995). The burden then shifts to the employer to produce evidence that it took adverse action for a legitimate, nondiscriminatory reason. When the respondent produces evidence that the complainant was subjected to adverse action for a legitimate, nondiscriminatory reason, the rebuttable presumption created by the complainant's prima facie showing "drops from the case." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.10.

Once the respondent has presented his rebuttal evidence, the answer to the question whether the plaintiff presented a prima facie case is no longer particularly useful. "The [trier-of-fact] has before it all the evidence it needs to determine whether 'the defendant intentionally discriminated against the plaintiff.'" *USPS Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. at 253). *Carroll v. Bechtel Power Corp.*, 1991-ERA-0046, slip op. at 11 (Sec'y Feb. 15, 1995) (Secretary's order enforced *sub nom Carroll v. United States Dep't of Labor*, 78 F.3d 352 (8th Cir. 1996)).

Thus, after a whistleblower case has been fully tried on the merits, the ALJ does not determine whether a prima facie showing has been established, but rather whether the

complainant has proved by a preponderance of the evidence that the respondent discriminated because of protected activity.<sup>3</sup>

Martin did not meet his burden of proof because he failed to show that the relevant company employees had knowledge of his complaint to the TNRCC. More specifically, it was undisputed that AKZO was subject to the CAA, that Martin engaged in protected activity when he reported a CAA violation to the TNRCC on June 26, 2001, and that AKZO took adverse action against Martin on July 10, 2001, when it suspended him from work without pay for three days for misusing company funds and exercising poor judgment in regard to his June 16, 2001 purchase of meals at company expense, Respondent's Exhibit (RE) 8; Complainant's Exhibit (CX) 4; Hearing Transcript (HT) at 30. R. D. & O. at 5-6. However, as the ALJ found, Martin failed to prove that, at the time that the disciplinary decision was made, any AKZO employee who was involved in the decision to discipline Martin knew that Martin had reported a CAA violation to the TNRCC.

The ALJ's finding is supported by the record evidence. Specifically, Henry Staniszewski, an environmental manager with AKZO who escorted the investigator from the TNRCC during his visit to AKZO, testified that he believed that someone driving past the AKZO plant had made the CAA complaint. HT at 280, 294. The ALJ found Staniszewski's testimony to be credible. In addition, Chad Anderson and Donald

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<sup>3</sup> In setting forth the legal standard governing proof of discrimination in cases arising under the environmental whistleblower statutes, such as the CAA, the ALJ, citing cases arising under the Energy Reorganization Act (ERA), 42 U.S.C. § 5851 (2000), stated that if at hearing a complainant proves "by a preponderance of the evidence that he engaged in protected activity which was a contributing factor in an unfavorable personnel decision," then the burden shifts to the employer "to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior. *Trimmer v. U.S. Depart. of Labor*, 174 F.3d 1098 (10th Cir. 1999); *See also Dysert v. Secretary of Labor*, 105 F.3d 607 (11th Cir. 1997)." Recommended Decision and Order (R. D. & O.) at 4-5. While Congress has specifically placed a higher burden on the employer in an ERA case in such circumstances, i.e., to demonstrate by "clear and convincing" evidence that it would have nevertheless taken the same action, *see* 42 U.S.C. § 5851(b)(3)(D) (2000), it has not done so with respect to employers under the CAA. Thus under the CAA, the employer may meet that burden by only a preponderance of the evidence. *See Cox v. Lockheed Martin Energy Sys., Inc.*, ARB No. 99-040, ALJ No. 97-ERA-17, slip op. at 4 n.7 (ARB Mar. 30, 2001). We find, however, that this isolated misstatement of the burdens of proof did not affect the relevant analysis and outcome of the ALJ's R. D. & O., which we adopt in all other aspects. We also note that the ALJ's description of an adverse action as "an unfavorable personnel action" does not fully express the need for the action to have a "tangible" effect or consequence in order to qualify as conduct prohibited under the Act. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998); *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1178 (10th Cir. 1999); *Jenkins*, ARB No. 98-146, slip op. at 17. A suspension without pay, as in this case, clearly fits that requirement.

Empfield, who were AKZO officials who participated in the decision to discipline Martin, testified that they were unaware of the TNRCC complaint and of Martin's protected activity when the AKZO officials decided to discipline Martin. HT at 269, 302-305. Although Martin testified that he had informed his fellow employee, Arthur Jackson, and other fellow employees, that he had filed a CAA complaint, HT at 31, 111, 141, the ALJ found that it would be mere speculation to attribute knowledge of this to either Anderson or Empfield, whose testimony the ALJ found was also credible. In weighing the testimony of witnesses, the fact-finder considers the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony and the extent to which the testimony was supported or contradicted by other credible evidence. *Cobb v. Anheuser Busch, Inc.*, 793 F. Supp. 1457, 1489 (E.D. Mo. 1990); *Shrout v. Black Clawson Co.*, 689 F. Supp. 774, 775 (S.D. Ohio 1988); *Jenkins*, ARB No. 98-146, slip op. at 9. The ARB defers to an ALJ's credibility findings that "rest explicitly on an evaluation of the demeanor of witnesses." *Stauffer v. Wal-Mart Stores, Inc.*, ARB 99-STA-2, slip op. at 9 (ARB July 31, 2001) quoting *NLRB v. Cutting, Inc.*, 701 F.2d 659, 663 (7th Cir. 1983). Since we did not have the benefit of witnessing the testimony of Staniszewski, Anderson and Empfield, we defer to the ALJ's demeanor-based observations about their credibility. Finally, as the ALJ found, the record does not indicate that any other AKZO employee with input in the decision to discipline Martin had any knowledge of the complaint Martin filed with the TNRCC at the time the decision was made.<sup>4</sup>

We have carefully reviewed the record and find that it fully supports the ALJ's findings of fact. We agree with the ALJ's analysis and conclusion that because Martin failed to prove that any AKZO employee who was involved in the decision to discipline him had any knowledge of Martin's protected activity under the CAA at the time of the decision, Martin failed to prove that AKZO violated the Act.

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<sup>4</sup> Debbie Sullivan and Scott Fossum were also AKZO officials who participated in the meeting held on July 3, 2001, in regard to disciplining Martin and in the drafting of the letter of discipline given to Martin, RX 3-4; HT at 228, 298-302.

## **CONCLUSION**

Accordingly, because Martin has not demonstrated by a preponderance of the evidence that he was disciplined in violation of the CAA, we **DISMISS** his complaint.

**SO ORDERED.**

**JUDITH S. BOGGS**  
**Administrative Appeals Judge**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**